IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77-595

U. S. INDUSTRIES, INC.,
Petitioner,

v.

JOHN D. PAGE and DON THOMAS,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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SUBJECT INDEX

LIST OF AUTHORITIES

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Petitioner, U. S. Industries, Inc., respectfully prays that a writ of *certiorari* issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on July 25, 1977. Petition for Rehearing denied September 13, 1977.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit, dated July 25, 1977, is reported at 556 F.2d 356, 15 FEP Cases 487, 14 EPD ¶ 7754, and is reprinted in Appendix E hereto. The judgment of the Fifth Circuit

is reprinted in Appendix F and the Notice of Order on the Petition for Rehearing dated September 13, 1977, is reprinted in Appendix G. The orders of the United States District Court for the Southern District of Texas dated June 16, 1975, October 8, 1975, June 4, 1976, and June 30, 1976, are reprinted in Appendix A, Appendix B, Appendix C and Appendix D, respectively.

JURISDICTION

The judgment of the court of appeals herein was entered on July 25, 1977. Petitioner's timely Petition for Rehearing was denied on September 13, 1977. This Petition for Certiorari is filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the time period for filing a private civil action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(f)(1), is a jurisdictional prerequisite to maintaining a Title VII charge.

2. Whether the time period for filing a private civil action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(f)(1), can be extended by the federal courts because of an erroneous and improper notice issued by the Equal Employment Opportunity Commission.

STATUTORY PROVISIONS INVOLVED

Title VII of the Civil Rights Act of 1964, as amended (hereinafter "Title VII"), 42 U.S.C. § 2000e, *et seq.*,

specifically Sections 705(e), 706(f)(1) and 717(c) of Title VII which are set forth in their entirety in Appendix H.

STATEMENT OF THE CASE

Respondent John D. Page filed a charge of discrimination with the Equal Employment Opportunity Commission (hereinafter "EEOC") on April 23, 1969 alleging that Petitioner had discriminated against him because of his race by paying him less than it paid similarily-situated white employees. Four years later, on April 13, 1973, the EEOC issued a determination finding reasonable cause to credit the charge. Thereafter, Petitioner entered into conciliation efforts with the EEOC and, on February 11, 1974, executed a conciliation agreement with the EEOC with respect to Page's charge which provided for significant affirmative action but did not provide any monetary relief for Respondent. On February 15, 1974, the EEOC advised Respondent that the EEOC had successfully conciliated his charge but that no specific remedy had been provided for him. That letter further stated that Respondent could request a "notice of Right to Sue" at any time. Respondent contacted a lawyer and entered into an attorney-client relationship on March 11, 1974 and, at that time, executed a form which authorized his attorney to request and receive a "Notice of Right to Sue" from the EEOC. On May 8, 1974, Respondent's attorney wrote the EEOC requesting a "Notice of Right to Sue" and on May 21, 1974, the EEOC issued the "Notice of Right to Sue" form to Respondent's attorney. The Complaint which initiated this cause of action was filed on August 14, 1974, some six months after Re-

spondent had been advised that the EEOC had successfully conciliated his charge.

On June 16, 1975, the district court dismissed Respondent's Title VII action as not being timely filed (App. A, p. 13). Thereafter, on October 8, 1975, on Respondent's motion to reconsider, the district court reinstated the Title VII cause of action (App. B, p. 16). Petitioner then sought reconsideration and, on June 4, 1976, the district court again ruled that Respondent's Title VII cause of action could be maintained (App. C, p. 19). Thereafter, on June 30, 1976, the district court certified the issue for an interlocutory appeal (App. D, p. 22). Petitioner perfected its interlocutory appeal and on July 25, 1977, the court of appeals affirmed the district court with respect to Respondent's Title VII cause of action and, on September 13, 1977, denied Petitioner's Petition for Rehearing and Suggestion for Rehearing *En Banc* (App. E, p. 24; App. G, p. 45).

REASONS FOR GRANTING THE WRIT

Both the district court and the court of appeals below specifically recognized in their holdings that the February 15, 1974 letter which the EEOC sent to Respondent complied with the statutory prerequisites for commencing the 90-day statutory period in which to file suit. However, the holding below is inconsistent with prior decisions of this Court regarding the jurisdictional prerequisites to maintaining a Title VII action in that it incorrectly concludes that the statutory 90-day period for filing the action can be extended by the choice of words the EEOC elected to use in that letter. Such ruling is contrary to the express statutory language, decisions of

this Court[1] and other circuit courts,[2] including the circuit court which rendered the decision.[3]

Petitioner is fully aware that this Court has previously denied petitions for certiorari in *Tuft v. McDonnell Douglas Corp.*, 517 F.2d 1301 (8th Cir. 1975), *cert. den.* 423 U.S. 1052 (1976); and *Lacy v. Chrysler Corp.*, 533 F.2d 353 (8th Cir. 1976), *cert. den.* 429 U.S. 959 (1977). However, the circuit court decisions in those cases involved the question of what is necessary to satisfy the requirements of Section 706(f)(1) and thus initiate the 90-day period. In this petition, the circuit court clearly held that the requirements of Section 706(f)(1) were satisfied and the February 15, 1974 letter commenced the 90-day period running (App. E, p. 24). In spite of that conclusion, the circuit court permitted the 90-day period to be extended because the February 15 notification included extraneous and erroneous advice to the effect that Respondent could request a "Notice of Right to Sue" at any time. Unlike *Tuft* and *Lacy*, the question presented here is not when does the 90-day period begin to run, but whether once that period commences, can it be extended.

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1. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974); *Brown v. General Service Administration*, 425 U.S. 820 (1976); *Electrical Workers (IUE), Local 790 v. Robbins & Meyers, Inc.*, 429 U.S. 229 (1976); *Evans v. United Air Lines, Inc.*, ____U.S.____, 97 S.Ct. 1885 (1977).

2. *Lacy v. Chrysler Corp., supra; Hinton v. CPC International, Inc.*, 520 F.2d 1312 (8th Cir. 1975); *Cleveland v. Douglas Aircraft Co.*, 509 F.2d 1027 (9th Cir. 1975); *Wong v. Bon Marche*, 508 F.2d 1249 (9th Cir. 1975).

3. *Eastland v. Tennessee Valley Authority*, 547 F.2d 908 (5th Cir. 1977); *Genovese v. Shell Oil Co.*, 488 F.2d 84 (5th Cir. 1973).

Congress set out clear and precise requirements for the initiation of a private Title VII action in Section 706(f)(1) of Title VII by providing, in relevant part:

> "If . . . the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission . . . shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought. . ." 42 U.S.C. § 2000e-5(f)(1).

The decision below correctly held that the February 15, 1974 letter the EEOC sent Respondent complied with the Congressional mandate that the EEOC "shall so notify the person aggrieved" that it had entered into a conciliation agreement to which the person aggrieved was not a party. However, the decision below erroneously failed to give effect to the further Congressional mandate that a civil action be filed "within ninety days after the giving of such notice."

This Court spoke clearly and unequivocally with respect to the jurisdictional nature of the Congressionally-established time period for filing a charge of discrimination in *Electrical Workers (IUE), Local 790 v. Robbins & Meyers, Inc., supra,* holding that compliance with such time period for filing a charge of discrimination is a jurisdictional requirement to the subsequent prosecution of a Title VII action. Cf., *Evans v. United Air Lines, Inc., supra.* The rationale of those decisions is equally applicable with respect to the nature of the Congressionally-established time period for filing a Title VII suit, the question which is herein presented.

Petitioner submits that the time period for filing a complaint in federal court cannot be extended by pur-

ported reliance upon erroneous advice from the EEOC any more than can the time period for filing a charge of discrimination be extended by reliance upon exhaustion of a contractual grievance procedure prior to filing a charge. The reasoning of this Court in *Robbins & Meyers* is equally applicable to this case:

> ". . . Congress has already spoken with respect to what it considers acceptable delay when it established a 90-day limitations period, and gave no indication that it considered a 'slight' delay followed by 90-days equally acceptable. In defining Title VII's jurisdictional prerequisite 'with precision,' Alexander v. Gardner-Denver Co., supra, at 47, Congress did not leave to courts the decision as to which delays might or might not be 'slight.'" 429 U.S. 229, at 240.[4]

There is even less reason to extend the 90-day period in which to file suit than there is to extend the 180-day period in which to file a charge of discrimination. In the instant appeal, the Congressionally-preferred policy of informal compliance through conciliation had been achieved long before the federal court complaint was filed. Respondent and EEOC had actually entered into a conciliation agreement acceptable to the Commission but unacceptable to the aggrieved party. The broad policies of Title VII will not be furthered by permitting an untimely Title VII action to proceed where the complaint upon which the charge was based has been resolved to the satisfaction of the agency charged with enforcement of Title VII. Further, in the instant case there is no

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4. Prior to the 1972 amendments to Title VII, 42 U.S.C. § 2000e-5(d) provided for a 90-day period in which to file a charge with the EEOC.

equitable justification for distinguishing from the *Robbins & Meyers* principle. In the instant case the aggrieved party was advised that the EEOC would do nothing more to assist in obtaining relief. Whereupon Respondent retained counsel. For more than two months after being hired by Respondent his counsel chose to sit on Respondent's rights. Then he attempted to bring this action almost six months after the 90-day period began to run. This type of conduct was specifically condemned by the Eighth Circuit in *Lacy v. Chrysler Corp. (Whitfield v. Certain-Teed Products Co.), supra,* where the Eighth Circuit observed:

> "At oral argument, Whitfield's counsel conceded that he had been retained between the first and second letter—the determination by the EEOC that it would not file suit—before even requesting a formal right to sue letter. Upon receiving the second letter, Whitfield knew that the EEOC's administrative procedures had terminated. . . . A contrary determination would permit a knowledgable and informed aggrieved party to postpone indefinitely the issuance of a formal right to sue letter and thus delay indefinitely the initiation of the 90-day period prescribed by law. . . ." 533 F.2d at 361.

The decision of the Eighth Circuit in *Hinton v. CPC International, Inc., supra,* is entirely consistent with the rationale of this Court in *Robbins & Meyers* but is totally inconsistent with the decision below. In *Hinton,* the Eighth Circuit held that the 90-day time period for filing a Title VII action could not be extended even though the plaintiff delayed filing his complaint because he was engaged in settlement discussions and the defendant agreed to extend the time period for filing the complaint.

It simply is not for the parties to extend the mandatory time periods by agreement or through use of a contractual grievance procedure and it is not for the federal courts to permit the EEOC to extend the mandatory time period for filing suit by including extraneous and erroneous language in its statutorily-required notification to the aggrieved party.

See also the Ninth Circuit decision in *Cleveland v. Douglas Aircraft Co., supra,* where the court stated:

> "Appellant's third argument, that he should not be time-barred because of his reliance on the advice of the EEOC, is without substance. In *Pittman v. United States,* 341 F.2d 739, 741 (9th Cir. 1965), this court stated:
>
> "'*Federal Crop Insurance Corp. v. Merrill,* 332 U.S. 380 . . . and *Munro v. United States,* 303 U.S. 36 . . ., simply preclude successfully relying on a waiver of time limitation or a mistake of the government attorney on the applicable law.'
>
> "*Pittman* involved an action against the government from which the government stood to gain from the erroneous advice and therefore it applies with even greater force in the present appeal." 509 F.2d at 1030.

Further, the opinion below is in direct conflict with a prior decision of the same circuit. In *Eastland v. Tennessee Valley Authority, supra,* the Fifth Circuit held that the time period for governmental employees to file a Title VII complaint in federal court, Section 717(c) of Title VII, could not be extended even though the notice received did not comply with the administrative agency's own regulations. There the court of appeals recognized

that the 30-day time period in which governmental employees may file a Title VII suit is jurisdictional and mandatory, relying upon prior decisions involving the nature of the time period for private litigants to file a Title VII suit. The court of appeals reasoned that to replace the notice required by Section 717(c) "with the notice specified in the Civil Service Commission's own regulations . . . would be an improper extension of the jurisdiction of the federal courts by an administrative agency . . . This we decline to do." 553 F.2d 364, 369. Thus, the government received the benefit of its erroneous notification procedure. However, in the instant case, a private employer is held not to be able to rely upon the untimeliness of the filing of the complaint even though the circuit court concluded that the sole effect of the action of the EEOC was an "unlawful extension" of the statutory period for filing a suit. Such a double standard must not be permitted. The decision of the court of appeals in the instant case is clearly erroneous and diametrically opposed to a prior decision of the same circuit.

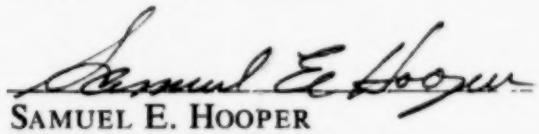
This Court has not yet had before it the meaning of the specific requirement of Title VII that a civil action must be brought within 90 days. However, its previous decisions in *Alexander v. Gardner-Denver Co., supra; Brown v. General Service Administration, supra; Electrical Workers (IUE), Local 790 v. Robbins & Meyers, Inc., supra;* and *Evans v. United Air Lines, Inc., supra,* give a clear logical roadmap as to the proper answer to the question. This petition for certiorari presents the other side of the coin of the *Robbins & Meyers* decision. "Congress did not leave to the courts the decision as to which delays might or might not be" excusable. Since this

action was not commenced within the 90-day period set out in Title VII, Respondent has not met the jurisdictional prerequisites to bringing this action and the court of appeals was in error in attempting to engraft a judicial amendment to a legislative enactment.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned certifies that on this 21 day of October, 1977, copies of the foregoing Petition for a Writ of Certiorari were served upon Carol Nelkin, Nelkin & Nelkin, 5417 Chaucer, Houston, Texas 77005, Attorney for Respondents, and upon James R. Watson, Jr., Bray & Watson, 500 Texas Professional Tower Building, 608 Fannin Street, Houston, Texas 77002, Attorney of Record for International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, AFL-CIO, and its Affiliate Local 561, by depositing the same in the United States Mail, postage prepaid, certified, return receipt requested.

Samuel E. Hooper

SAMUEL E. HOOPER

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. 74-H-1097

JOHN D. PAGE and DON THOMAS, ET AL,

v.

U. S. INDUSTRIES, INC.; INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIPBUILDERS, BLACKSMITHS, FORGERS AND HELPERS, AFL-CIO, and its affiliate LOCAL UNION NO. 561,
Defendants.

(Filed June 16, 1975)

ORDER

The Court, having considered Defendant U. S. Industries, Inc.'s Motion to Dismiss, hereby ORDERS:

Defendant's Motion is granted as to Plaintiffs' claims under 42 U.S.C. § 2000e *et seq.* which were raised in the charges of discrimination filed with the Equal Employment Opportunity Commission by Plaintiff John D. Page on April 23, 1969, alleging that Defendant Company had violated 42 U.S.C. § 2000e *et seq.*, hereinafter referred to as "Title VII;" the charge of discrimination filed by Plaintiff Don Thomas on January 17, 1972, alleging that Defendant Union had violated Title VII; and the charge of discrimination filed by Plaintiff Don

Thomas on November 29, 1973, alleging that Defendant Company had violated Title VII. The claims raised under 42 U.S.C. § 2000e *et seq.* by virtue of the charge of discrimination filed by Plaintiff Don Thomas on January 17, 1972, alleging that Defendant Company had violated Title VII are not dismissed. Title VII claims raised by virtue of the charges filed by Plaintiffs on April 23, 1969 (Page against Defendant Company), January 17, 1972 (Thomas against Defendant Union), and November 29, 1972 (Thomas against Company) must all be dismissed because of Plaintiffs' failure to institute a civil action in an appropriate United States District Court within 90 days after notification that the Equal Employment Opportunity Commission had concluded its administrative processes with respect to each charge. By letter dated February 15, 1974, Plaintiff Page was advised that the Equal Employment Opportunity Commission had concluded processing the charge he filed on April 23, 1969. In order for a timely Title VII suit to have been instituted, a complaint would necessarily have been filed 90 days after this letter was received by Plaintiff Page. This action, however, was not filed until August 14, 1974, approximately 180 days after receipt of the February 15, 1974 notification. Plaintiff Thomas was notified by a no cause determination issued on February 21, 1974, that the Equal Employment Opportunity Commission had concluded processing the charge he had filed against Defendant Union on January 17, 1972. This action was not instituted within 90 days thereafter and Title VII claims raised in that charge must be dismissed. Similarly, Plaintiff Thomas was notified by a no cause determination issued on March 26, 1972, that the Equal Employment Opportunity Commission had concluded processing

the charge he had filed against Defendant Company on November 29, 1973. This action was not instituted within 90 days thereafter and Title VII claims raised by that charge must be dismissed.

Defendant's Motion to Dismiss Plaintiffs' claims under 42 U.S.C. § 1981 is granted with respect to any alleged illegal acts which occurred more than two years prior to the filing of this action.

SIGNED AND ENTERED this 16th day of June, 1975.

/s/ WOODROW SEALS
United States District Judge

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. 74-H-1097

JOHN D. PAGE and DON THOMAS, ET AL.,
Plaintiffs

vs.

U. S. INDUSTRIES, INC.; INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIPBUILDERS, BLACKSMITHS, FORGERS AND HELPERS AFL-CIO, and its affiliate LOCAL UNION NO. 561,
Defendants

(Filed October 8, 1975)

ORDER

Plaintiffs have requested this Court to reconsider its Order of June 16, 1975, dismissing Plaintiff Page's Title VII claims on the grounds that they were not timely filed in this Court. In addition, Plaintiff seeks reconsideration of another portion of the same order granting dismissal of their 42 U.S.C.A. § 1981 claims. After due consideration, the Court finds merit in the Plaintiffs' arguments and the motion to reconsider is GRANTED as to the Title VII and § 1981 issues.

Plaintiffs quite properly have pointed out that through oversight this Court has taken contrary positions in two

separate cases. The June 16, 1975 Order dismissed the § 1981 claims on the grounds that *Johnson v. Railway Express Agency, Inc.*, 421 U.S. ____, 43 U.S.L.W. 4623 (May 19, 1975), was retroactive and in *Luther James Bush v. Woods Bros. Transfer, Inc. et al,* C.A. No. 73-H-956, this Court concluded that it was not retroactive. The Court adheres to the *Bush* Memorandum and Order and the *Page* June 16, 1975 Order is revised accordingly.

In *Bush* the Court considered at length the proper application of the retroactivity test expressed most recently by the Supreme Court in *Chevron Oil Co. v. Huson,* 1971, 404 U.S. 97, to the *Johnson* problem presented there. This same type of analysis provides a satisfactory resolution to the additional problem presented here in *Page*—the appropriate disposition of a Title VII Plaintiff misled by the administrative policies of the EEOC into the belief that suit could be delayed until the right-to-sue letter was requested. Each of the *Huson* factors, (i) originality of a new rule of law, (ii) the policy nature of the prior rule and the effect of retrospective readjustment, (iii) the degree of "injustice or hardship" that would result from retroactive application, *Chevron Oil Co. v. Huson, supra,* at 306, convinces this Court that the Plaintiffs' Title VII claim should not be dismissed. The Court is convinced that the June 16, 1975 Order is correct insofar as it concludes that the first letter from the EEOC commenced through the ninety day statute of limitations. However, this Court follows the Second Circuit in its conclusion that this dismissal is improper where the Plaintiffs have been misled. *DeMatteis v. Eastman Kodak Co.*, 2nd Cir. 1975,

511 F.2d 306, *Petition for Rehearing granted,* ____F.2d ____.

The Clerk will file this Order and furnish all parties with a true copy.

Done at Houston, Texas, this 8th day of October, 1975.

/s/ WOODROW SEALS
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. 74-H-1097

JOHN D. PAGE and DON THOMAS, ET AL.,
Plaintiffs

vs.

U. S. INDUSTRIES, INC., INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIPBUILDERS, BLACKSMITHS, FORGERS AND HELPERS, AFL-CIO, AND ITS AFFILIATE, LOCAL NO. 561,
Defendants

(Filed June 4, 1976)

MEMORANDUM AND ORDER:

Defendant, U. S. Industries, Inc., has requested this Court to reconsider its Order of October 8, 1975 on the grounds that:

(1) The Fifth Circuit case of *Dupree v. Hutchins Brothers,* 5th Cir. 1975, 521 F.2d 236, has overridden the Order of this Court to the effect that 42 U.S.C.A. § 1981 is not tolled while a charge is pending before the EEOC because *Johnson v. Railway Express Agency, Inc.,* 1975, 421 U.S. 545, was retroactively applied, and

(2) That Plaintiffs' Title VII complaints should not have been preserved by this Court, despite the fact that

Plaintiffs were misled by the EEOC two-letter procedure, because Plaintiffs filed suit after the requisite ninety-day statute of limitations.

These issues have been well briefed by the parties and after considering them at length the Court concludes that Defendant cannot prevail on either issue and its motion to reconsider is DENIED.

The question whether *Johnson* should be applied retroactively is a difficult one. Defendant is quite correct when it states that the Court of Appeals in *Dupree* effectively applied the ruling retroactively. However, this Court is not at all convinced that the issue was squarely presented to the Court of Appeals by the litigants in *Dupree*. Consequently, in the absence of a definitive decision on the issue, this Court concludes that the most judicious approach is to follow the decision of Judge Carl O. Bue, Jr. in *Helen Williams v. Phil Rich Fan Manufacturing Co., Inc.*, Civil Action No. 74-H-1345 (S.D. Tex. May 6, 1976). In that Order Judge Bue concluded that the proper resolution of this issue is that the question of the retroactive application of *Johnson* is an open question even after the *Dupree* decision and that the Supreme Court rule should not be applied retroactively.

Similarly, despite Defendant's vigorous arguments, this Court remains convinced that where Plaintiffs such as these have been misled by the EEOC two-letter procedure, Plaintiffs should not be jurisdictionally barred from litigating their Title VII claims. This Court is convinced that the remedial intent of the 1964 Civil Rights Act mandates this much.

The Clerk shall file this Memorandum and Order, and provide all parties with a true copy.

Done at Houston, Texas, the 4th day of June, 1976.

/s/ WOODROW SEALS
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. 74-H-1097

JOHN D. PAGE and DON THOMAS, Individually and on behalf of all others similarly situated,
Plaintiffs

vs.

U. S. INDUSTRIES, INC., INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIPBUILDERS, BLACKSMITHS, FORGERS, AND HELPERS, AFL-CIO, And Its Affiliate, LOCAL NO. 561,
Defendants

(Filed June 30, 1976)

ORDER AMENDING INTERLOCUTORY ORDER:

This matter is before the Court on Defendant, U. S. Industries, Inc.'s, Motion To Amend Interlocutory Order of June 4, 1976, whereby this Court reconsidered its Order of October 8, 1975, dismissing Plaintiff Page's Title VII claims on the grounds that they were not timely filed and dismissing the Plaintiffs' 42 U.S.C. § 1981 claims with respect to all allegations of discrimination occurring prior to two years from the date of filing this lawsuit. Defendant seeks to amend the June Order to include a certification of questions pursuant to 28 U.S.C.

§ 1292(b) and Rule 5(a), Federal Rules of Appellate Procedure. Accordingly, it is hereby ORDERED:

The Order of this Court on June 4, 1976, is amended to include the following:

1. The two questions of law decided by this Court's Order of June 4, 1976 are controlling questions of law as to which there is substantial ground for difference of opinion, and an immediate appeal from this Order may materially advance the ultimate termination of this litigation.

2. The Order entered on June 4, 1976, as hereby amended, shall be deemed entered as of the date indicated below for purposes of computing the allowable time for filing a petition for permission to appeal.

The Clerk will file this Order and provide counsel for all parties with a true copy.

Done at Houston, Texas, this 30th day of June, 1976.

/s/ WOODROW SEALS
United States District Judge

APPENDIX E

John D. PAGE and Don Thomas et al.,
Plaintiffs-Appellees,

v.

U. S. INDUSTRIES, INC., et al.,
Defendants-Appellants.

Rebecca WILLIAMS,
Plaintiff-Appellant,

v.

CLE CORPORATION, d/b/a
Sheraton-Chateau Lemoyne,
Defendant-Appellee.

Nos. 76-3366, 75-3822.

UNITED STATES COURT OF APPEALS
Fifth Circuit.

July 25, 1977.

In two cases brought under federal civil rights statutes and involving claims of racial discrimination in employment, an appeal and an interlocutory appeal were taken from decisions entered in the United States District Court for the Eastern District of Louisiana, R. Blake West, J., and in the United States District Court for the Southern District of Texas, Woodrow B. Seals, J. The Court of Appeals, Gee, Circuit Judge, held that: (1) letter from Equal Employment Opportunity Commission to complain-

ant which only related that conciliation efforts had failed, but did not inform complainant that Commission had decided not to sue was insufficient to trigger 90-day limitation within which civil rights racial discrimination in employment case must be filed; (2) action on claim of racial discrimination in employment and seeking back pay and brought under federal civil rights statute concerning equal rights under the law was governed by one-year limitation provision of Louisiana statute concerning "offenses and quasi-offenses"; (3) letter received by civil rights complainant from Commission and which did not stop at informing complainant that his case had in effect been administratively closed but went on to inform him in explicit terms that the 90-day time period within which to bring suit would not run until he requested and received notice of right to sue was insufficient to trigger such 90-day limitation period; (4) Supreme Court decision that filing of a civil rights claim under equal employment opportunities title with Commission does not toll the limitations applicable to a cause of action under federal civil rights statute concerning equal rights under the law would be given retrospective effect so as to apply to action brought before decision was handed down, and (5) action brought under civil rights statute concerning equal rights under the law was governed by Texas two-year limitations statute.

Affirmed in part and reversed in part in both cases.

Fay, Circuit Judge, filed a specially concurring opinion:

* * *

Appeal from the United States District Court for the Eastern District of Louisiana.

Appeal from the United States District Court for the Southern District of Texas.

Before WISDOM, GEE and FAY, Circuit Judges.

GEE, Circuit Judge:

In this opinion we dispose of two cases which, although involving different facts and somewhat different issues, are both concerned with procedures employed by the Equal Employment Opportunity Commission (the EEOC) in informing complaining individuals of their right to seek judicial action. In each case the question is whether the plaintiff timely filed suit after initially referring his case to the EEOC. We hold that, by the law of this circuit, the district court should hear each plaintiff's Title VII action.

Congress has enacted a comprehensive scheme for the resolution of Title VII claims, involving both administrative and judicial action. Section 706(f)(1) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(f)(1) (1970), as amended, outlines the procedural scheme:

> (f)(1) If within thirty days after a charge is filed with the Commission . . . the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. . . . The person or persons aggrieved shall have the right to intervene in a civil action brought by the

> Commission. . . . If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge . . . the Commission has not filed a civil action under this section . . . or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission . . . shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice.

Initially the individual must rely on the EEOC either to conciliate his claim or to file a civil action on his behalf. Only after 180 days have passed from the filing of his administrative complaint may he seek a judicial remedy, and even then before he can sue he must receive notice that the EEOC has failed to conciliate his claim and has not sued. He has 90 days from this notice to bring suit.

The common problem in these two cases is what suffices to trigger the running of the 90-day period within which an individual must file suit. Doubtless the Congress contemplated that the EEOC would complete its investigation, attempt to conciliate, and reach the decision whether or not to sue within 180 days, and then notify the complainant immediately. Unfortunately, the avalanche of discrimination complaints to the EEOC has prevented it from completing administrative action on complaints within the 180-day period. *See Zambuto v.*

American Telephone & Telegraph Co., 544 F.2d 1333, 1334 n. 5 (5th Cir. 1977); *EEOC v. Louisville & Nashville R. Co.*, 505 F.2d 610, 616-17 (5th Cir. 1974), *cert. denied*, 423 U.S. 824, 96 S.Ct. 39, 46 L.Ed.2d 41 (1975). These administrative delays have produced consequent delays in notifying claimants of the failure of the EEOC either to conciliate their claims or to file suit. Because section 706(f)(1) requires that an individual receive this notice before the 90-day period starts, questions of when the EEOC should send notice after completion of the 180-day period and what constitutes adequate notice have become important. We have recently condemned one EEOC practice designed to provide the statutory notice.

In *Zambuto v. American Telephone & Telegraph Co.*, *supra*, we ruled that the EEOC improperly extended the period for filing suit when it gave notice that the administrative process was closed[1] but then informed complainants that they could *request* the required statutory notice after which they must bring suit within 90 days. This procedure invalidly placed in a claimant's hands the power to postpone the commencement of the 90-day period after the administrative process had terminated. Congress designed the 90-day period to protect employers from stale claims, and the EEOC's practice deprived them of that protection. We went on to rule, however, that this "two-letter" procedure was "patently misleading" so that justice required that we make our ruling prospective only

1. In *Zambuto* we also stated that to be adequate as statutory notice of right-to-sue, the notice must not only state that conciliation efforts have failed but also that the EEOC has decided not to sue. In essence, the notice must indicate that the administrative process has terminated. 544 F.2d at 1335.

and allow Mrs. Zambuto to pursue her action. Against this background we turn to the individual cases before us.

I. *Williams v. CLE Corporation*

Rebecca Williams, a black female, was employed as a front-desk clerk at the Sheraton-Chateau Lemoyne Hotel in New Orleans, Louisiana, in mid-1973. The hotel management discharged her in October 1973, and she filed a timely complaint of racial discrimination with the EEOC. On January 27, 1975, the EEOC issued a determination that it had reasonable cause to believe the appellant's charge was true. After the defendant rebuffed its conciliation efforts, on March 25, 1975, the EEOC sent Ms. Williams the following letter:

> This is to advise you that conciliation efforts . . . have failed to achieve voluntary compliance with Title VII of the Civil Rights Act of 1964, as amended. The Respondent Company has declined the invitation to resolve the issues in your case.
>
> In accordance with Section 706(f)(1) of the Act, you have the right to file suit in Federal District Courts. Should you decide to exercise such right it must be done in writing. Please direct any communications to the Director, New Orleans District Office, EEOC.
>
> Thank you for your cooperation and feel free to call me if you have any questions.

On May 6, 1975, the EEOC sent Ms. Williams another letter captioned "Conciliation Failure Notice of Right to Sue" that provided in pertinent part:

> The Commission has determined that it will not bring a civil action against the respondent(s) and

accordingly is issuing you this Notice of Right to Sue. The issuance of this Notice terminates the Commission's processing of your charge, except that the Commission may seek status as intervenor if you decide to sue on your own behalf as described below.

If you want to pursue your charge further, you have the right to sue the respondent named in this case in the United States District Court for the area where you live. IF YOU DECIDE TO SUE, YOU MUST DO SO WITHIN NINETY (90) DAYS FROM THE RECEIPT OF THIS NOTICE; OTHERWISE YOUR RIGHT IS LOST.

Ms. Williams filed her suit on July 31, 1975, 132 days after the March 25 letter but within 90 days of the May 6, letter. Plaintiff appended to her Title VII action a claim under 42 U.S.C. § 1981 alleging racial discrimination in employment. This claim came approximately 18 months after her discharge.

The trial court dismissed plaintiff's suit. It held that the EEOC's March 25 letter began the 90-day prescriptive period and that Ms. Williams failure to bring suit within 90 days of that letter barred her Title VII claim. The trial court dismissed the section 1981 suit on the grounds that Louisiana requires suits for back pay to be brought within one year, with the result that plaintiff's suit was clearly filed too late.

A. *The Title VII claim.* The C.L.E. Corporation argues, and the district court apparently agreed, that the March 25 letter gave sufficient notice of the EEOC's failure to conciliate her claim and its decision not to sue to start the running of the 90-day period. CLE asserts

that the March 25 letter's statement that "in accordance with Section 706(f)(1) of the Act, you have the right to sue in Federal District Courts (sic)" provides sufficient notice. We disagree.

[1-3] To begin the 90-day limitation period, the complainant must receive notice that the EEOC has completed its administrative efforts. *See Zambuto, supra* at 1335. The March 25 letter only related that conciliation efforts had failed; it did not inform her that the EEOC had decided not to sue. Perhaps she could have inferred this from the EEOC's reminder of her right to sue, but the reminder was ambiguous. She could easily have read it as saying that the EEOC still contemplated suit, but she might choose to institute her own action. It is true that, unlike *Zambuto,* the March 25 letter does not affirmatively mislead Ms. Williams as to when she may file suit, but neither does it convey sufficient notice of the termination of the administrative process.[2] The 90-day period did not begin running from the date of Ms. Williams' receipt of the March 25 letter; only the May 6 letter provided adequate notice.

[4] Even were we to conclude that the March 25 letter served as adequate notice, we could not ignore the misleading effect of the May 6 letter. In the May 6 letter the EEOC explicitly informed Ms. Williams that she had 90 days *from the date of that letter* to file suit. This

2. We reject Ms. Williams' proposition that an adequate statutory notice must include the information that the complainant has only 90 days within which to file suit. Although other courts have required such language, *see Coles v. Penny,* 174 U.S. App. D.C. 277, 531 F.2d 609 (1976); *Gates v. Georgia Pacific Co.,* 492 F.2d 292 (9th Cir. 1974), we held in *Zambuto* that the statutory notice need only inform the complainant that the administrative process is terminated. 544 F.2d at 1335.

action was no less "patently misleading," perhaps more so,[3] than the letters in *Zambuto*. Ms. Williams was entitled to rely on this seemingly authoritative statement by the agency presumed to know the most about these matters. The same equitable considerations that led us to allow Mrs. Zambuto to pursue her action convince us that we should permit Ms. Williams to continue her action. *See Zambuto, supra* at 1336; *Reeb v. Economic Opportunity Atlanta, Inc.*, 516 F.2d 924, 929-30 (5th Cir. 1975). *See also DeMatteis v. Eastman Kodak Co.*, 520 F.2d 409, 410-11 (2d Cir.), on petition for rehearing from 511 F.2d 306 (2d Cir. 1975); *Gates v. Georgia Pacific Corp.*, 492 F.2d 292, 295 (9th Cir. 1974); *Stebbins v. Nationwide Mutual Ins. Co.*, 469 F.2d 268, 269 (4th Cir. 1972).

[5-7] B. *The section 1981 claim.* The district court dismissed Ms. Williams' claim under 42 U.S.C. § 1981 because it was not brought within one year of the alleged act of discrimination. It ruled that the Louisiana statute proscribing actions for back pay after one year applied to section 1981 actions seeking back pay, so that Ms. Williams' section 1981 suit was untimely.[4] Because section 1981 states no limitations period, we must rely on applicable state statutes of limitation. *See* 42 U.S.C. § 1988; *Guerra v. Manchester Terminal Corp.*, 498 F.2d 641, 647 (5th Cir. 1974). On appeal the parties have suggested four Louisiana statutes that might provide the appropriate prescriptive period—Louisiana Civil Code arts. 3534 (one year for actions for workmen's wages), 3536 (one year for actions resulting from "offenses or quasi-offenses"), 3538 (three years for actions for clerks' salaries), and 3544 (ten years for claims not specifically covered in other articles). Before we can determine the applicable statute of limitation, however, we first must decide how Louisiana would chacterize the section 1981 cause of action.[5] *See Ingram v. Steven Robert Corp.*, 547 F.2d 1260, 1261-62 (5th Cir. 1977); *Shaw v. McCorkle*, 537 F.2d 1289, 1293 (5th Cir. 1976). We conclude that Louisiana law would characterize Ms. Williams' action as one sounding in tort—i.e., an "offense or quasi-offense." *See* La.Civ. Code art. 3536.

[8] In *Sims v. Orleans Railway & Light Co.*, 134 La. 897, 64 So. 823 (1914), the Louisiana Supreme Court defined "offenses and quasi-offenses" as infringements of some right personal to the individual or the violation of

3. In *Zambuto* the letter clearly informed the complainant that her case was administratively closed but assured her in the next paragraph that she could request a right-to-sue letter and have 90 days to sue upon its receipt. In this case the first letter, read in a manner most favorable to the defendant, only implied that the EEOC had completed its administrative efforts. Whatever Ms. Williams thought after the first letter, the second letter—like the next paragraph of the *Zambuto letter*—assured her that she had 90 days in which to act.

4. Although Ms. Williams argued that the filing of her Title VII claim tolled the statute of limitations on the section 1981 action, it is clear now that this is not the case. *See Johnson v. Railway Express Agency*, 421 U.S. 454, 95 S.Ct. 1716, 44 L.Ed.2d 295 (1975). We have applied *Johnson v. Railway Express* retroactively. *See Williams v. Phil Rich Fan Co.*, 552 F.2d 596, 598 (5th Cir. 1977); *Dupree v. Hutchins Bros.*, 521 F.2d 236 (5th Cir. 1975).

5. 42 U.S.C. § 1981 provides that:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

some duty imposed by law. Louisiana federal district courts have used this definition to hold that actions under 42 U.S.C. § 1983 for state deprivations of civil rights constitute "offenses and quasi-offenses" with the prescriptive period of one year found in La.Civ. Code art. 3536. *See Heyn v. Board of Supervisors*, 417 F.Supp. 603, 604-05 (E.D.La. 1976); *Whitsell v. Rodriguez*, 351 F. Supp. 1042, 1044 (E.D.La. 1972). Similarly, we believe that the definition of "offenses and quasi-offenses" includes actions under section 1981. As we noted recently, section 1981 cases arise independently of any contractual agreement between employee and employer, *see Ingram*, *supra* at 1263; instead, they arise from the employer's violation of his duty not to violate the plaintiff's civil rights secured under section 1981. *Cf. Loggins v. Steel Construction Co.*, 129 F.2d 118 (5th Cir. 1942) (alternative holding that art. 3536 applied to violation of positive provisions of Fair Labor Standards Act). When an employer discriminates on the basis of race in violation of section 1981, he has violated a duty imposed by law—he has committed an "offense or quasi-offense." Thus, actions giving rise to section 1981 claims are proscribed by the one-year provision of Louisiana Civil Code art. 3536. *See O'Sullivan v. Felix*, 233 U.S. 318, 34 S.Ct. 596, 58 L.Ed. 980 (1914).

Ms. Williams argues that under Louisiana law we must look to her pleadings: that the character she gives them and the form of her action determine the nature of her claim. *See Federal Ins. Co. v. Ins. Co. of North America*, 262 La. 509, 263 So.2d 871, 872 (1972); *Importsales, Inc. v. Lindeman*, 231 La. 663, 92 So.2d 574, 576 (1957); *United Carbon Co. v. Mississippi River Fuel Corp.*, 230 La. 709, 89 So.2d 209, 212

(1956). An examination of her pleadings only reinforces the *ex delictu* nature of Ms. Williams' claim. Ms. Williams alleges several acts of discrimination and then asserts that those acts violate section 1981. We cannot characterize these allegations as stating a contractual claim with a prescriptive period of ten years, as described in Louisiana Civil Code art. 3544.[6] The pleadings allege violations of the duty not to discriminate imposed by section 1981. They allege tortious activity—"offenses or quasi-offenses" under Louisiana law.

[9, 10] Ms. Williams also claims that the relief she seeks in her pleadings should control the characterization of her action. Because she seeks equitable relief only, she argues that her claim is a personal action not enumerated in previous prescriptive provisions qualifying for treatment under Louisiana Civil Code art. 3544 and its ten-year prescriptive period. Louisiana does provide special prescriptive periods for actions seeking certain forms of relief. For example, actions seeking back wages proscribe in one year. La. Civ. Code art. 3534. Nevertheless, Louisiana lays down no special prescriptive period for any action seeking equitable relief, and a prayer for injunctive relief does not automatically invoke the ten-year period of art. 3544. The relief sought may help characterize the cause of action expressed in the plaintiff's pleadings, *see e.g., Importsales, Inc. v. Lindeman*, 231 La. 663, 92 So.2d 574, 576-77 (1957), but under

---

6. We recognize that dicta in *Boudreaux v. Baton Rouge Marine Contracting Co.*, 437 F.2d 1011 (5th Cir. 1971), suggested that section 1981 claims are contractual and governed by the ten-year prescriptive period. 437 F.2d at 1017 n. 16. But we are not bound by dicta, and we have recently rejected these in favor of the analysis we employ here. *See Ingram v. Steven Robert Co.*, 547 F.2d 1260, 1263 (5th Cir. 1977).

Louisiana law the relief sought, if not covered by a special prescriptive period, does not control if the nature of the cause of action is otherwise clear. It is now clear that actions under section 1981 are *ex delictu;* the relief sought can have no further impact on characterizing the action unless *ex delictu* actions seeking equitable relief fall under the ten-year prescriptive period of Louisiana Civil Code art. 3544.[7] Ms. Williams has not cited nor have we found any Louisiana case involving *ex delictu* action in which a claim for injunctive relief has been held to transform the action into one eligible for the ten-year prescriptive period. Without persuasive state authority, we adhere to our conclusion that Louisiana Civil Code art. 3536 sets out the proper prescriptive period for section 1981 actions. *See Smith v. Olinkraft, Inc.,* 404 F.Supp. 861, 864 (W.D.La. 1975).

At oral argument Ms. Williams' counsel suggested another prescriptive period that might prove applicable in this case. He argued that if we agree with the trial court that Ms. Williams' suit was essentially an attempt to seek monetary relief in the form of back salary, *see* n. 7 *supra,* the Louisiana Civil Code art. 3538[8]—providing a three-year prescriptive period for clerks' salaries—

7. As part of her prayer for equitable relief, Ms. Williams asks that the court make her whole by providing back pay, social security and other benefits. Although we agree with the district court that this part of the prayer more closely resembles a prayer for damages, we will assume, for purposes of this argument, that it is a prayer for equitable relief.

8. Art. 3538. The following actions are prescribed by three years:

* * *

That for the salaries of overseers, clerks, secretaries, and of teachers of the sciences who give lessons by the year or quarter. La. Civ. Code art. 3538.

supplies the appropriate prescriptive period. Assuming for purposes of argument that Ms. Williams qualifies as a "clerk" under the statute, we nevertheless conclude that the three-year statute does not apply.

[11] Ms. Williams' claim for back pay is one for compensatory damages arising from the employer's violation of his duty to her under section 1981. *See Johnson v. Railway Express Agency,* 421 U.S. 454, 460, 95 S.Ct. 1716, 44 L.Ed.2d 295 (1975). The three-year prescriptive period refers to claims arising from contracts or quasi-contracts for the payment of salary and bears no relation to compensatory claims under section 1981. Although in *Boudreaux v. Baton Rouge Marine Contracting Co.,* 437 F.2d 1011 (5th Cir. 1971), we suggested that an analogous prescriptive period for back wages, Louisiana Civil Code art. 3534, might apply when the plaintiffs sought damages for loss of back pay, we made that statement on the assumption that an action under section 1981 in Louisiana was *ex contractu.* Our holding today that a section 1981 action arises *ex delictu* in Louisiana terminates the applicability of prescriptive provisions referring to back pay in a contractual context. The plaintiff's prayer that she be "made whole" for the consequences of the defendant's alleged discrimination is more analogous to a prayer for compensatory relief than an attempt to enforce a contractual right. If art. 3538 did apply it would present an anomalous situation in which the underlying cause of action—the "offense" of violating section 1981—was proscribed but the remedy—back salary—was not. Our reading of the Louisiana prescriptive provisions presents a more coherent characterization of the cause of action under section 1981 and the relief available under it.

In summary, we hold that the district court erred in dismissing Ms. Williams' Title VII action but that Ms. Williams' action under 42 U.S.C. § 1981 proscribed under Code art. 3536 when it was not brought within one year of the offense.

II. *U.S. Industries, Inc. v. Page*

Page, a black employee at the Wyatt Division of U.S. Industries in Houston, filed with the EEOC in 1969 a charge alleging discrimination in paying him less than similarly situated white employees. On April 13, 1973, the EEOC issued its "reasonable cause" notice, and conciliation efforts were begun, culminating in the execution on February 11, 1974, of a conciliation agreement which provided for affirmative action on the part of U.S. Industries but no specific relief for Page. He was notified of this outcome by a letter dated February 15, 1974, from the Houston office of EEOC, which read as follows:

> On February 13, 1974, the Equal Employment Opportunity Commission's Houston District Office successfully conciliated the above referenced matter. However, no specific remedy was provided for you.
>
> You may now request a "Notice of Right to Sue" from this office at any time. If you so request and the notice is issued, you will have ninety (90) days from its receipt to file suit in Federal District Court.
>
> It is advisable that if you wish to pursue this matter, further that you have an attorney ready to proceed with the case prior to issuance of the "Notice of Right to Sue." If you do not have an attorney available and you wish to proceed further with your case then call our General Attorney, for assistance in securing one for you.

Thus advised that the attack had carried but that he was one of the casualties, Page did secure an attorney, who on May 8 requested the notice from EEOC; it was sent on May 21. Page's suit was filed in the district court on August 14, within 90 days of his receipt of the notice of right to sue but some six months after the February 15 letter.

Page's complaint charged violations of Title VII and of 42 U.S.C. § 1981 (1970). On motion of U.S. Industries, the district court initially dismissed Page's Title VII claim because of his failure to file his suit within 90 days after receipt of the February 15 letter and also dismissed his section 1981 claim as to any acts of discrimination alleged to have occurred more than two years before his suit was filed. Later, on motion for reconsideration, the district court reinstated both the section 1981 and Title VII claims—the former because of its conclusion that *Johnson v. Railway Express Agency*, 421 U.S. 454, 95 S.Ct. 1716, 44 L.Ed.2d 295 (1975), was not to be applied retroactively, and the latter because of its conclusion that Page had been misled by the February 15 letter and should not suffer dismissal because of his mistaken reliance upon it. Subsequently, two controlling questions were certified pursuant to 28 U.S.C. § 1292(b) (1970), and we granted leave for this interlocutory appeal.

A. *The Title VII claim.* Whatever validity the two-letter procedure might appear to possess when employed in the situation where the EEOC has unsuccessfully sought conciliation and is still in the process of determining whether to file its own suit, it is entirely inappropriate in the factual context presented by the case before

us. The logical import of the February 15 letter could only be that the EEOC was satisfied with the outcome of the conciliation process and would not be filing suit against U.S. Industries, since one does not typically sue to remedy the outcome of an administrative proceeding he regards as successfully terminated. Thus, this letter should have informed Page both that the conciliation process had come to a close *and* that the EEOC did not intend to file suit—as the statute has been read to require before the 90-day period begins to run. *See Zambuto,* 544 F.2d at 1335. The only possible end to be served by withholding the notice of right to sue was the unlawful extension of the statutory limitations period which we condemned in *Zambuto,* a condemnation which we reiterate in this case.

[12] As in *Zambuto*, however, the initial letter received by Page did not stop at informing him that his case had in effect been administratively closed; it went on to inform him, in terms more explicit than those of *Zambuto's* first letter, that the 90-day time period would not run until he requested and received a notice of right to sue. He was carefully advised to secure an attorney, or ask EEOC's assistance in securing one, before starting the clock running by requesting the notice. Unless he had carefully read Title VII with a prescience about forthcoming appellate decisions uncommon even among experienced civil rights lawyers, Page would certainly have been misled by the February 15 letter and would have assumed that no deadline impended until his lawyer had requested and received the notice. The affirmatively misleading character of the February 15 letter requires our application of the *Zambuto* rule and, as in that case, "we will not visit the

effects of EEOC's erroneous practice on [Page] who was misled by terminating [his] right to judicial examination of [his] employer's conduct." 544 F.2d at 1336. The district court correctly reinstated Page's Title VII claim, which should now proceed to trial.

[13, 14] B. *The section 1981 claim.* In *Johnson v. Railway Agency, Inc.*, 421 U.S. 454, 95 S.Ct. 1716, 44 L.Ed.2d 295 (1975), the Supreme Court held that the filing of a Title VII claim with the EEOC does not toll the statute of limitations applicable to a 42 U.S.C. § 1981 action. Page's suit was filed before the *Johnson* decision was handed down, so that the success of his section 1981 claim depends upon whether *Johnson* is to be given retroactive application in this circuit. In reinstating Page's section 1981 claim below, the district court followed the approach taken in another case in the same Southern District of Texas, *Williams v. Phil Rich Fan Mfg. Co., Inc.*, No. 74-H-1345 (S.D. Tex., May 6, 1976), holding that *Johnson* did not apply retroactively. We recently reaffirmed that Johnson's no-tolling rule is, indeed, to be given retrospective effect, by reversing the decision relied on by the court below. *Williams v. Phil Rich Fan Mfg. Co., Inc.*, 552 F.2d 596 (5th Cir. 1977). In Texas, the appropriate limitations period for section 1981 actions is the two-year period set out in Tex. Rev. Civ. Stat. Ann. art. 5526 (1958). *Dupree v. Hutchins Brothers,* 521 F.2d 236, 238 (5th Cir. 1975). Accordingly, Page's section 1981 claim must be dismissed insofar as it relates to any acts alleged to have occurred more than two years before his filing of suit in federal court.

In summary, in *Williams v. CLE Corp.*, we affirm the district court's dismissal of the section 1981 claim but

reverse its dismissal of her Title VII claim, and in *U.S. Industries v. Page,* we affirm the district court's retention of Mr. Page's Title VII claim but hold that the section 1981 claim is time barred. We also note, in closing, the extreme importance of EEOC's heeding our admonition in *Zambuto* and ceasing forthwith to deliver misleading or incomplete notices to claimants; April 11, 1977, has now long passed. IT IS SO ORDERED.

FAY, Circuit Judge, specially concurring:

Although joining in Judge Gee's excellent opinion, I feel compelled to note this concurrence recognizes the binding effect of *Zambuto v. American Telephone and Telegraph Co.,* 544 F.2d 1333 (5th Cir. 1977) upon all panels of this court unless altered by en banc proceedings. As the trial judge in *Zambuto,* I reluctantly concluded that the "seemingly authoritative statement by the agency presumed to know the most about these matters" was not sufficient to abrogate the clear limitations and time periods prescribed by Congress. Nothing has changed my mind. The law, however, has been clearly established in Title VII cases and such unfortunate incidents should not occur in the future.

APPENDIX F

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 76-3366

D. C. Docket No. CA74-H-1097

JOHN D. PAGE and DON THOMAS, ET AL.,
Plaintiffs-Appellees,

versus

U. S. INDUSTRIES, INC., ET AL.,
Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Texas

Before WISDOM, GEE and FAY, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that defendants-appellants pay to plaintiffs-appellees, the costs on appeal to be taxed by the Clerk of this Court.

July 25, 1977

FAY, Circuit Judge, specially concurring.

Issued as Mandate:

APPENDIX G

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

OFFICE OF THE CLERK

Edward W. Wadsworth
Clerk

Tel. 504-589-6514
600 Camp Street
New Orleans, La. 70130

September 13, 1977

TO ALL PARTIES LISTED BELOW:

NO. 76-3366—JOHN D. PAGE, ET AL. v. U. S. INDUSTRIES, INC.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition ( ) for rehearing** and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition ( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH,
Clerk

By /s/ BRENDA M. HAUCK
Deputy Clerk

** on behalf of appellants, U. S. Industries, Inc., Et. al.,

cc: Messrs. Samuel E. Hooper
Charles B. Gallagher
Ms. Carol Nelkin

APPENDIX H

42 U.S.C. § 2000e-5(e)

A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

* * *

42 U.S.C. § 2000e-5(f)(1)

If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d), the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action

against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d), whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was

aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsections (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

* * *

42 U.S.C. § 2000e-16(c)

(c) Within thirty days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection 717(a), or by the Civil Service Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex or national origin, brought pursuant to subsection (a) of this section Executive Order 11478 or any succeeding Executive orders, or after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit or with the Civil Service Commission on appeal from a decision or order of such department, agency, or unit

until such time as final action may be taken by a department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 706, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.